STATEMENT OF ROBERT E. HAMPTON,
CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION BEFORE THE
SUBCOMMITTEE ON EMPLOYEE BENEFITS OF THE
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
OF THE UNITED STATES HOUSE OF REPRESENTATIVES ON

H.R. 7199 and S. 1438, Bills "To protect the civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy."

May ~~12~~ 19, 1971 19th

MR. CHAIRMAN:

Vice Chairman Johnson, Commissioner Andolsek, and I are pleased that you requested the views of the Civil Service Commission on the proposed legislation which you, Mr. Chairman, correctly describe in your letter of invitation to be a "most important matter." It is a most important matter and it is particularly important to me as this is the first opportunity that the present Administration has had to present its views on the matter. While I have been a member of the Civil Service Commission since 1961 and have joined my colleagues in the past in opposing similar legislation, I feel a real obligation to all concerned to express my views on the pending bills in my own words.

Quite obviously, no one would oppose the stated purposes of this proposed legislation. The protection of the constitutional rights of Government employees and the prevention of unwarranted invasions of their privacy are ~~some of~~ among the most fundamental objectives of Federal personnel administration. Our opposition to the proposed legislation is based on the fact that it will not achieve the purposes sought in either a fair or effective manner. I will explain that fact during my testimony this morning.

My prepared statement discusses the language in S. 1438 which is for the most part identical to the language in H.R. 7199. In the few places where the language differs regarding the coverage of the Federal Bureau of Investigation, the Central Intelligence Agency and the National Security Agency I will note those differences. My testimony is directed to S. 1438 because some of it refers to earlier testimony given by Senator Ervin with respect to previous legislation of the same type he has introduced in the past. The testimony is, however, fully applicable to the same section and paragraph designations in H.R. 7199.

The prohibitory language in section 1 of S. 1438 is, with a few exceptions, unchanged from the time the first bill of this nature was introduced in 1966. That fact, in and of itself, is in my opinion a valid objection to the bill. Times have changed; policies and practices have changed; new beneficial procedures and rights for employees have been created over the past 5 years; and reports on earlier bills have pointed out the need for language changes, but the bill is still couched in almost the same terms and is still directed against the same invasions of "alleged" constitutional rights which we believe have long since been corrected when warranted and which, if they should reoccur, are susceptible of what we believe is a more effective means of correction than this bill would provide.

Over the years since 1966 the Senate Subcommittee on Constitutional rights has referred a number of specific cases to the Civil Service Commission that we found did warrant corrective action. But those instances have been relatively few in number and not of a character that we feel warrants special legislation of this type. If there really is the large number of these cases that has been alleged, we frankly do not understand why the labor organizations within Government, with the effective grievance procedures which many of those

organizations helped to structure through negotiated agreements, have not brought those cases up for resolution. This is particularly so when you consider that since August 1966 when the first bill of this type was introduced the number of Federal employees represented by labor organizations has grown from 1,054,000 to last November's count of 1,542,000--an increase in union representation of from 40% of the covered work force to 58% of that work force.

When I referred to invasions of "alleged" constitutional rights a few moments ago I did so deliberately. While I am not a lawyer, I never heard of a constitutional right that would be violated by asking selected employees to report their financial interests in order to protect the Government against conflict of interest involvement. If some part of the Constitution is violated by requiring such a disclosure, then the Senate itself has been violating that constitutional right for years when in its "advice and consent capacity" it requires prospective Presidential appointees to make those very same disclosures only in more detail and in public (ours are made and kept in confidence).

Also, what part of our Constitution entitles an employee who is (to use the words of section 1(d) of the bill) "under investigation for misconduct" (such as smoking in a restricted area of a munitions storage depot) to have his attorney present before his supervisor can ask him whether or not he was smoking? If there is such a constitutional right it surely is not limited to Government employees and I believe our business leaders and industrial supervisors in the private sector will be amazed to learn that such discourse with an employee is unconstitutional.

But I will leave to the lawyers the question of whether the matters covered by the bill are really matters of constitutional right because I want

to devote sufficient time to calling the Subcommittee's attention to what I, as an executive officer charged with responsibilities in the area of Federal personnel management, regard as particularly bad legislative proposals in the bill.

When Senator Ervin testified before this Subcommittee on July 2, 1968, he said the bill then under consideration which was identical in purpose to the ones under discussion today dealt with specific violations of the First Amendment rights of applicants for, and employees of, the Federal Government. He also said the bill (at that time it was S. 1035)--and I quote--"does not affect the power of the executive branch to deal with employees within the proper confines of the employment relations." In the same vein, the Senator said the bill would not affect--and again I quote--"the authority of Federal managers to manage". I must respectfully but emphatically disagree with the Senator's appraisal of the bill's effect.

I have already given you the example of the supervisor who would not be allowed to ask the employee if he was or was not smoking which strikes me as a quite severe curtailment of the proper authority of a Federal manager to manage. Consider also what restrictions would be placed on proper management by section 1(d) of the bill.

Section 1(d) would bar a supervisor from requesting an employee to report on any of his activities unless they are related to the performance of official duties which are or may be assigned to him, or the skills which qualify him for those duties, or unless there is reason to believe he is engaged in conflict of interest activities. That provision could prevent the Civil Service Commission from asking an employee about an alleged violation of the Hatch Act; it could bar inquiries in areas relating to national security and employee safety; and it could prevent the resolution of complaints received

from a citizen about the outside conduct of a Government employee. For example, a supervisor may have received information that an employee who operates heavy industrial equipment has been drinking heavily during his off-duty hours and is keeping such late hours that his job efficiency could in time be impaired. As we read section 1(d), the supervisor could not ask the employee for a report on these matters and, presumably, would have to wait until the employee's condition became such as would justify the inquiry as being related to the performance of the employee's duties. Even then, as explained earlier, the supervisor could not discuss the matter with the employee unless the employee had his attorney present.

Now we are confident that incongruous results such as these were not intended but we have offered simple, clarifying amendatory language to prevent these results and none of it has been adopted. This is why we are seriously concerned over the bill; it is still drafted in the same 1966 language even though the seriously adverse effect of that language on proper management prerogatives has been clearly spelled out in earlier reports.

This Subcommittee has the expertise to understand and deal with the very fundamental issues raised by S. 1438. In order for the business of Government to be carried out effectively and efficiently, the managers and supervisors in Government (just as their counterparts in the private sector) must have the proper authority to manage and supervise. What we ask is that you give fair consideration to the marked extent that this bill would interfere with the exercise of those proper authorities.

Some of that interference could seriously damage Governmental efficiency. Today, within the executive branch, we have an ethical conduct program designed to prevent employees who occupy positions which could involve them in conflict

of interest situations from any inadvertent involvement in those situations. The regulations under which that program operates are open for all to examine; they are published in the Code of Federal Regulations. Our program stresses the confidential treatment of the financial interest statements filed by employees and expressly provides a means to resolve a complaint by an employee who feels his position is one that should not require that he file such a statement.

I want to emphasize that our ethical conduct program is a preventive one; we do not (as sections 1(i) and 1(j) of the bill would require) wait and ask for a report on specific items tending to indicate a conflict of interest. We get the information in advance and by examining it, and consulting with the employee as necessary, conflicts involvements are avoided. The restrictive language of the two paragraphs mentioned would negate, for all practical purposes, the ethical conduct program within the executive branch. We have explained this in detail in the past and we have submitted amendatory language to correct what we regard to be serious errors in the drafting of those paragraphs but none of that language has been adopted. I cannot bring myself to believe that the Congress intends to terminate the ethical conduct program of the executive branch. [redacted] But as we find the same unchanged language used year after year we cannot be other than disturbed over what appears to be a lack of real appreciation of what that language would do.

I have not taken the separate paragraphs of section 1 of the proposed legislation up in their order of appearance because I wanted to make certain important points clear to the Subcommittee from the start. I will, however, now go back and starting with paragraph (a) of section 1 I will discuss those

provisions which I urge the Subcommittee to give careful consideration. What I urge you to consider is whether or not these provisions interfere with proper--and I emphasize the word "proper"--management authorities.

Section 1(a) is another good illustration of why we feel the bill is out of date. Section 1(a) would prohibit an official from requesting an applicant or employee to disclose his race, religion, or national origin. The executive branch used such a self-disclosure method only once and that was in 1966. For the past 4 years we have used the visual identification method which is not proscribed by the proposed legislation. So in that regard the prohibition in the bill does not concern us. What does concern us, however, are the inferences that when we collect data on race, religion, or national origin we do it for the purpose of determining a person's qualifications. Nothing could be farther from the truth.

The Civil Service Commission authorizes the collection of race or national origin data by visual identification under strict controls which are spelled out in the Code of Federal Regulations. [Subpart C of Part 713 of Title 5, Code of Federal Regulations.] This is done in keeping with merit system principles to further the policy of Congress set out in section 7151 of title 5 of the United States Code to insure equal employment opportunities for all our citizens without regard to race, religion, national origin or other irrelevant considerations. In order to achieve the goal of real equal employment opportunity it is essential that we have statistical information showing how different races fare in obtaining Federal employment and in advancing in that employment to their full potential. Congress authorized that to be done among private employers by the Civil Rights Act and the Equal Employment Opportunity Commission does just that--requires private employers to collect data on their employees' color, race, sex, and national origin.

If this activity is good and proper to do among private employers, why do the proponents of this bill ascribe an invidious intent to the Commission when we require it among executive branch employers?

Please understand that we are clearly aware that the prohibition in the proposed legislation is against self-disclosure of one's race, religion, or national origin. We have no objection to that general prohibition but we do object to the repeated erroneous inferences that these data are collected to determine a person's qualifications. In addition, we object to the language in the bill which would prevent an executive official from making an inquiry that would enable him to resolve a complaint by an employee that he has been discriminated against because of his race, religion, or national origin. Senator Ervin testified in 1968 that he thought it would be "very difficult to tell a Presbyterian by the way he parts his hair". We agree with that conclusion by the Senator and unless we can ask about the religious composition of a segment of an agency's work force with regard to which a discrimination complaint is pending there is no realistic way to decide if it is true that a named supervisor never hires or promotes protestants or catholics or whatever the charge encompasses.

Once again I ask the Subcommittee to consider what is required of proper executive branch management. Are we to turn away such a complaint with the explanation that a Congressional enactment prevents its resolution? That seems to us to be a serious interference with proper executive management particularly in view of the fact that the Equal Employment Opportunity Commission makes precisely the same kind of inquiry of private employees in enforcing the counterpart provisions of the Civil Rights Act.

We explained in our report last year to the Subcommittee on Manpower and Civil Service on S. 782 how section 1(a) could be amended to prevent it operating as a bar to the proper resolution of discrimination complaints but, again, the amendatory language was not used. At this point I ask permission to include in the present record the Commission's report on S. 782 as that report is directly applicable to the proposed legislation now being discussed as it is identical thereto in all substantive respects.

The Commission has no objection to paragraph (b) of section 1 now that the legislative history has been made clear to show the Congressional intent with regard to the operation of that provision which relates to an agency taking note of employees' attendance or nonattendance at meetings unrelated to their official duties.

We have only a minor problem with section 1(c) in that it could be interpreted so as to interfere with worthwhile activities such as the blood donor program as we do request employee participation in that program and the program is not related to employees' official duties. I refer the Subcommittee to our report on S. 782 which contains brief amendatory language that would prevent the present language of the proposed legislation from causing a result that was apparently not intended.

I have already covered paragraph (d) of section 1 and as noted in our report on S. 782 we can accept paragraph (e) without amendment.

Paragraph (f), which relates to the use of polygraphs, is not of concern to the Civil Service Commission as we do not use those instruments. In that regard we feel the Subcommittee should give careful attention to the submissions of the Executive agencies that deal with intelligence, counter-intelligence, and international-affairs matters such as the recognized security agencies and the Department of Defense and the Department of State.

At this point I want to call the Subcommittee's attention to the one difference between S. 1438 and H.R. 7199. The Senate bill, in section 9, excepts the Federal Bureau of Investigation from the bill entirely. The House bill, in section 6, excepts the Federal Bureau of Investigation, the Central Intelligence Agency, and the National Security Agency from the polygraph and psychological test prohibitions and the prohibition against the submission of a financial disclosure statement when the head of the agency concerned makes a personal finding that the test or financial statement is required to protect the national security. The Senate bill limits that partially excepting provision to the Central Intelligence Agency and the National Security Agency by reason of its complete exception of the Federal Bureau of Investigation.

Section 7 of the House bill and section 8 of the Senate bill provide guarantees that the bills will not operate to prevent the heads of these security agencies from withholding information pursuant to statute or Executive order and bar the use of such information in any proceeding authorized by the proposed legislation.

In addition, the Senate bill provides in section 7 that no employee of the Central Intelligence Agency or the National Security Agency and no individual or group acting in behalf of such an employee may use the grievance or judicial review procedures under the bill without first submitting the grievance to his agency. The section also preserves to the heads of those agencies their statutory authority to terminate employees when that termination is required in the interests of the United States.

The Civil Service Commission accedes to the views and judgments of the three security agencies regarding these provisions but we do have one observation that may aid the Subcommittee in considering this matter. Within the executive branch we have recognized that because of the extremely sensitive nature of the duties of the employees of these security agencies it is not appropriate or in the interests of the United States to cover them into the usual personnel provisions. For two recent examples of their exclusion I call the Subcommittee's attention to Executive Order No. 11491 relative to labor-management relations which allows their exclusion in section 3 and to the new Part 771 of the Civil Service Regulations relative to employee grievances and administrative appeals which excludes those security agencies in section 771.103(b). In our best judgment we believe that each of these security agencies should be completely excepted from the proposed legislation in the same way the Federal Bureau of Investigation is excepted in section 9 of S. 1438.

Returning now to section 1 of the proposed legislation, we regard paragraph (g) of that section to be out of place in these bills. Paragraph (g) is a prohibition against coerced political activity by Federal employees. The coverage of the paragraph is almost identical to sections 7321 through 7324 of title 5 of the United States Code. Also, the paragraph is largely duplicative of section 602 of title 18 of the United States Code which makes it a crime for a Government official or employee to directly or indirectly solicit a contribution "for any political purpose whatever" from another Government official or employee.

While the Commission favors the objective of protecting Government employees against any form of coerced political action or support, we do not believe that such a provision is dependent on a constitutional right or belongs in proposed legislation of the type with which we are dealing. Also, as I indicated earlier, we do not consider it proper to enact duplicative legislation.

If the Subcommittee believes that strengthened political activity protections are needed for Government employees we urge that this be done by way of separate legislation that would take into consideration the statutory protections now on the books and supplement them as required rather than enacting duplicative legislation that could result in confused enforcement.

Paragraph (h) of section 1 is another instance of what we consider an unnecessary and outdated legislative proposal. Actually what paragraph (h) does is express the present executive branch policy which prohibits the coercion of employees to invest in Government bonds or to make charitable donations. For example, the "Manual on Fund Raising within the Federal Service for Voluntary Health and Welfare Agencies", December 1967 edition, stresses "true and voluntary giving" and expressly states: "Any practice that involves compulsion, coercion, or reprisal directed to the individual * * * employee because of the size of his contribution or his failure to contribute has no place in the Federal program." Moreover the Manual specifies that employees should be informed that if they believe the executive branch policy against coercion has been violated, they may file a complaint under the agency's grievance procedure or directly with the Civil Service Commission without going through the agency's grievance procedure.

With respect to the sale of United States Savings Bonds, the executive branch policy, as set by the United States Savings Bond Division of the Treasury Department is that the use of coercion in the promotion of bond sales is contrary to the objectives of the program and a violation of Government policy. Executive agencies are alert to the prohibition against coercion and in that regard I call the Subcommittee's attention to issuances by the Secretary of the Navy (SECNAVNOTE 5120 of 1 April 1971), the Postmaster General (memorandum of March 16, 1971), the Chief of Staff of the Air Force (memorandum of 6 March 1971), and Department of the Army Circular No. 608-36 of 9 March 1971, each of which stresses the voluntary nature of the bond sales program and warns against the use of pressure or coercion.

The point I want the Subcommittee to consider with regard to paragraph (h) is the same that I have made reference to with regard to other paragraphs. The statutory provision is not necessary as there is already in existence a clear and adequate administrative control that will accomplish exactly what the proposed statute would do. Please understand that I do not pretend that the administrative control provisions to which I have referred have ended the type of coercion discussed completely and forever. Neither will S. 1438. But I do believe that the existence of those administrative provisions, which are enforceable through the established administrative processes, evidence that legislation of the type proposed in paragraph (h) is not necessary. However, as the paragraph is wholly in keeping with our policy we have no objection to its enactment provided the one minor clarifying language change is made as explained in our report on S. 782.

I have already covered paragraphs (i) and (j) relative to financial disclosures under the ethical conduct program. But in passing I note that Senator Ervin indicated in 1968 when he testified before this Subcommittee that he had complaints from professional employees in high-ranking positions over the requirement that they file financial statements. The Senator states "No one in the executive branch has listened to them. That is why Congress must." I cannot help but wonder if those complaints arose before June 9, 1967, when we added a specific right for an employee who felt he should not be required to submit such a statement to file a grievance. If the complaints were submitted after that 1967 date, I would wonder if the complainant made use of the procedure available to him and if not -- why?

Paragraph (k) of section 1 is the provision I have already discussed which could entitle an employee to have his attorney present whenever his supervisor made inquiry of him about a matter that could lead to disciplinary action.

The final paragraph of section 1 (paragraph (l)) is unobjectionable as it would, quite properly, prohibit any disciplinary or retaliatory action against an employee who did not comply with a request, or submit to an action, made unlawful by the proposed legislation.

Section 2 would make the prohibitions in section 1 applicable to the officers and employees of the Civil Service Commission. If section 1 and the counterpart provisions in section 2 are amended as we have recommended, we would have no objection to section 2. Similarly, we do not object to

section 3 which, in effect, makes the section 1 prohibitions applicable to commissioned officers and members of the armed forces provided, again, our amendments of section 1 are adopted.

Section 4, however, is another matter. That section authorizes summary judicial intervention into the management of the executive branch which both we in the executive branch and the judicial branch believe is totally uncalled for. Under section 4 an applicant or employee would be able to sue a Federal officer or employee, in his individual capacity, on the basis of an allegation that the Federal officer or employee had violated or threatened to violate the bill's prohibitions. Moreover, that law suit could be started without the exhaustion of available administrative remedies and without any showing of pecuniary injury. Such summary judicial intervention is completely out of keeping with the long-established principle of sound judicial administration that an individual is not entitled to turn to the courts for judicial relief until he has exhausted his available administrative remedy.

An even more peculiar aspect of this provision is the fact that while section 5 sets up an elaborate administrative remedy for handling the grievances covered by the bill through a new Executive agency (the Board on Employees' Rights), section 4 does not require that an applicant or employee file his grievance with that Board and exhaust that administrative remedy before going directly to court. That peculiar aspect of the bill is referred to on page 60 of the report of the proceedings of the Judicial Conference of the United States issued December 18, 1969, by Chief Justice Warren E. Burger. In that report the Conference expressed its disapproval of section 4 by

noting that the section -- and here I quote from the Report -- "would give the employee the right to go directly into the Federal courts. Inasmuch as section 5 of the bill provides for the utilization of the administrative process by the aggrieved employee, the Conference disapproved section 4 as being inconsistent with the provisions of section 5." With the permission of the Chairman I would like to include into the record at this point a copy of pages 60 and 61 of the Judicial Conference Report containing the disapproval to which I have referred.

Another facet of section 4 that we consider objectionable is the provision which requires the Attorney General to defend any officer or employee sued under the section who acted pursuant to an order, regulation, or directive, or who, in the opinion of the Attorney General, did not willfully violate the provisions in the bill. With all due respect for the Attorneys General, for whom I have always held the greatest respect, this provision would make him become what might be termed a "prejudgment judicial officer." By that I mean that once a law suit is filed against an officer or employee for an alleged violation of the bill, the Attorney General would have to decide first whether the officer or employee acted pursuant to an order or regulation and, if he did, then decide if the employee willfully violated any proscription in the bill. Frankly, if the Attorney General makes those decisions adversely to the employee and decides not to defend the employee, and the employee shows up in court with a private attorney, the court will know that his case has been prejudged by the Attorney General and the employee will, in effect, be starting out with 3 strikes against him.

If any type of access-to-court provision is included in the legislation we strongly urge that the Attorney General have a free hand to defend any officer or employee without any statutory requirement for a prejudgment determination on his part.

Section 5 would create a new Executive agency (the Board on Employees' Rights which I will refer to as "the Board"). The Board would be composed of 3 part-time members appointed by the President, by and with the advice and consent of the Senate, whose function would be to hear and decide grievances filed under the bill. The Board would have a small staff -- I say small because the bill places a limitation of $100,000 on the expenditures to carry out section 5 -- which would investigate any complaints received and within 10 days from the date of receipt of a complaint set a hearing on the complaint. Within 30 days after the hearing (which would be held in accordance with the administrative procedure statute insofar as possible), the Board would issue a final decision. If the Board found a violation, it could issue a cease and desist order, or direct that the offending civilian officer or employee (other than a Presidential appointee appointed by and with the advice and consent of the Senate) be disciplined. The discipline could range from reprimand to removal. In the case of a Presidential appointee, the Board would make a report on the violation to the President and the Congress. In the case of a member of the armed forces, the Board would refer the matter to a person authorized to convene a general courts-martial.

There are many aspects of section 5 that we feel are bad, but in our judgment the worst aspect of it is that the creation of the Board would amount

to a Congressional rejection of executive branch efforts to maintain an affirmative, cooperative labor-management relations program. Each of the eleven basic prohibitions in section 1 are matters that could be the subject of negotiations between a Government labor organization and management and each of the items that prompted these provisions (for example a coerced bond purchase) is something that is susceptible to settlement under an agency's grievance procedure. And, again, I want to point out that an appreciable number of those grievance procedures exist because of negotiated agreements between a labor organization and management. We are convinced that this is the right way to resolve exployee grievances and that to segregate these eleven grievances for processing under the formal administrative procedure rules designed for the use of regulatory agencies would create an adversary action under a negative concept wholly at odds with the objective of achieving an affirmative, cooperative labor-management relations program.

Closely related to our first objection to section 5 is our second objection which is that there is no logical reason for creating a new Executive agency whose limited purpose is to resolve eleven types of grievances while all other grievances and the more serious matters of appeals relating to adverse actions (such as demotions, suspensions, and removals) are to continue to be processed under the currently operating agency and Civil Service Commission procedures. I find it impossible to understand the rationale that allows an employee who has been asked (not ordered, just asked) to donate blood to the Red Cross,to hail his supervisor into a Federal

court or file a complaint for processing through a separate Executive agency under the complexities of the administrative procedure statute, while his coworker who has been fired on grounds he believes are false, processes his appeal through the normal administrative channel and only after exhausting that administrative remedy is he entitled to judicial review.

I want to emphasize that I do not question the authority of the Congress to make it "unlawful" -- that is the word used in section 1 -- to request an employee to participate in the blood donor program, but I do question whether the Congress intentionally would make the correctional processes for a breach of such a relatively inconsequential unlawful act markedly more elaborate and complex than those it has authorized for the far more serious unlawful act of removing a veterans' preference employee on baseless charges.

There is also a practicable objection to the creation of the Board. While we have no way to estimate the number of complaints such a Board would receive, we believe its very creation would prompt some applicants and employees with either real or imagined grievances to file complaints. Assuming these complainants reside in different parts of the country we cannot help but wonder how this Board with its small staff and no field offices could possibly cope with even a minor workload. Keep in mind, also, that the Board members are part-time officers whose other regular employment would be bound to prevent their ready availability for travel either about the country to hold hearings or to the Board's central office to decide

the grievances. We assume the Board members will have other regular employment as their pay is fixed in section 5 at $75 a day which is approximately the same daily rate for an employee in the 10th step of grade GS-12. I consider it rather unrealistic to expect to employ Presidentially appointed officers to head up an Executive agency at such a low salary, but if they can be found they will surely need some regular outside employment or income beyond this part-time appointment.

The Subcommittee should also note that section 5 would create a conflict between the Board's statutory rights and the statutory rights of the Civil Service Commission. For example, section 5 authorizes the Board to "order" an employee's removal. We assume that such an order would be directed to the employing agency and that the agency would comply with it. The employee who was so removed would, under the veterans' preference statute and the competitive-service job protection program established under the civil service statutes, have the right to appeal the removal to the Civil Service Commission. In such an appeal, the regulations of the Commission provide that the employee is entitled to a hearing at which he is represented by an attorney, a union officer, a veterans organization, or other counsel. If that hearing establishes that the employee's removal was not justified, the Commission will order his agency to restore him which entitles him to back pay benefits under the back-pay statute. We do not consider it reasonable to enact legislation that creates this kind of conflict of authorities.

In brief we see no need for a Board of the type referred to in section 5 and feel that such a Board if established would be unable to cope with the task put upon it and would create serious intra-executive branch conflicts.

The only section on which I have not commented is section 10. That section states that neither the establishment of the Board nor the right of summary recourse to the courts prevents an agency from having a grievance procedure to enforce the provisions of the bill but the section then provides that the existence of such a procedure would not require an employee to use it and he could take his grievance directly to a court or to the Board. Section 10 also states that if an employee elects to go to the Board under section 5 he waives his right to go to court under section 4 and vice versa.

In conclusion, I hope I have been able to persuade the Subcommittee to focus on what we sincerely believe are provisions in the proposed legislation that are sorely in need of elimination or modification. I want to stress to the Subcommittee that all we ask of you is a fair consideration of the many ways that this proposed legislation would interfere with the proper management of the executive branch. I have no doubt that the proposed legislation, when originally drafted approximately 5 years ago, was motivated by a genuine concern that legislation was needed to protect employees of the Government with regard to several aspects of their employment. But this is 1971 not 1966 and if there is any need for legislation of the type proposed--which we feel has not been established--there is an equal need that it be drafted with care so that the business of Government is not restricted by unwarranted restraints on proper management actions.

We have, in the past, offered to make the Commission's staff available to prepare a bill that would achieve every reasonable and necessary protection of employee's rights while it concurrently recognized the reasonable and necessary requirements of executive branch management. I renew that offer today, and I am confident that joint cooperation in this regard will benefit all concerned.

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

CHAIRMAN

July 1, 1970

Honorable David N. Henderson
Chairman, Subcommittee on Manpower
and Civil Service
Committee on Post Office and Civil Service
House of Representatives

Dear Mr. Chairman:

This is in response to your request to submit the views of the Civil Service Commission on S. 782 which passed the Senate on May 19, 1970.

S. 782 is a bill "To protect the civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy". While the Commission agrees fully with the purpose of S. 782 as expressed in its title, the bill has provisions which would adversely affect the effective operation of the executive branch and to which we strongly object. This report discusses the two major faults in the proposed legislation. Other provisions of the bill which we feel need clarification or improvement are discussed in the appendix to this report.

The two major faults in the bill are the provisions that would (1) establish a new executive agency, "The Board on Employees' Rights" (referred to herein as the "Board") and (2) allow summary recourse to the Federal courts without the exhaustion of any administrative remedy.

Establishment of the Board

The establishment of the Board would be a retrogressive step not in keeping with present-day efforts to maintain a positive, cooperative atmosphere in the area of employee-management relations. Management in the Federal service is trained to deal fairly and cooperatively with employees and labor organizations. The creation of a separate agency for the exclusive purpose of hearing a limited number of employee grievances, with authority to direct disciplinary action against managers and supervisors, would change the present cooperative atmosphere to a litigious one. We believe the existence of the Board would emphasize adversary attitudes which is a negative approach totally at odds with the present positive policy of seeking employee-management cooperation.

The creation of the Board would result in a distortion of the programmatic needs of the Government by splintering off, for consideration in a separate agency, a small assortment of grievances. The matters referred to in section 1 of S. 782, while they are by no means not of consequence, are certainly of no greater consequence than the many other personnel aspects not touched by the bill. For example, the Board would not consider complaints of racial or religious discrimination, improper consideration of candidates for appointment, training, or promotion, and determinations relating to pay and leave. We find it particularly incongruous to establish a separate executive agency to determine whether a supervisor intimated that notice would be taken of the attendance of employees at a meeting on a non-job related subject, such as donating blood, whereas the regular, presently-established administrative process is considered adequate to decide such serious matters as whether an employee's removal from the service on a grave charge, such as criminal conduct, is procedurally valid and justified on the merits.

The grievance-type matters referred to in section 1 of the bill are not deserving of special treatment by a separate agency but should, like any other grievance or appeal, be handled under existing procedures in the agencies and the Civil Service Commission. Under the present system the Civil Service Commission operates as the central personnel agency dealing with all aspects of personnel management. We submit that it should continue to do so as this type of centralization is the only effective means of achieving consistency in total personnel administration.

Each executive agency has procedures for handling employee grievances which are required to conform with the standards set out in Subchapter 1 of chapter 771 of the Federal Personnel Manual. Moreover, today agencies and labor organizations have in many instances cooperatively worked out grievance procedures that would, in the areas covered by section 1 of the bill, be negated by the establishment of the Board. We are convinced that the establishment of the Board, with its attendant expensive procedures, will nullify the effectiveness of the grievance procedures produced under the present program.

Existing grievance and appellate procedures are fully effective to assure employees of the fair settlement of complaints of the type referred to in the bill. It is surely reasonable that agencies, as is the case under the present grievance and appellate processes, should be given the initial opportunity to settle internal personnel disputes before such matters are taken to an outside authority as would be the case if the Board were established.

The authority that would be given the Board to discipline an officer or employee of any agency in the executive branch would alter the general rule that the power to discipline is vested in the appointing authority. The placement of that authority in the Board would also create a conflict

with authorities vested in the Civil Service Commission by statute and Executive order to decide appeals within the executive branch with respect to disciplinary matters.

Summary Judicial Intervention

Section 4 of S. 782 would permit an employee or applicant for employment to sue a Federal officer or employee, in his individual capacity, when he is believed to have violated the prohibitions in the bill. Moreover, the lawsuit could be brought without exhausting any administrative remedy and without regard to the existence or amount of pecuniary injury.

It is a fundamental principle of sound judicial administration that an individual is not entitled to judicial relief until any existing administrative remedies have been exhausted. The proposal in section 4 is such a complete departure from the customary requirements for legal review that we are hard put to understand its intended objective. We are, however, certain that its result will not only place an uncalled for additional work load on our already overburdened judiciary, but will adversely affect the operation of the Government. A provision such as this, which is an invitation to sue for an imagined wrong without attempting an administrative settlement, could readily be used as a means of harassment against Government managers by vindictive individuals both within and outside of Government. Individuals who sincerely believe they have a valid complaint should certainly not object to a timely administrative review before seeking settlement by a court or other outside authority.

As the Civil Service Commission recognized that the provisions of section 4 allowing direct access to the courts would have an impact on the judicial branch we requested the Judicial Conference of the United States to consider that facet of S. 782. On page 60 of the report of the proceedings of the Judicial Conference issued on December 18, 1969, by Chief Justice Warren E. Burger, the Conference expressed its disapproval of section 4 as follows:

> "* * *Section 4 * * * would give the employee the right to go directly into the federal courts. Inasmuch as section 5 of the bill provides for the utilization of the administrative process by the aggrieved employee, the Conference disapproved Section 4 as being inconsistent with the provisions of Section 5."

We note also in this regard that the Deputy Attorney General in his report to the Chairman of the House Committee on Post Office and Civil Service on H.R. 1197, a bill containing a provision identical to section 4 of S. 782, had the following to say regarding the provision:

> "* * *In particular the Department objects to the provision of the bill allowing an employee who claimed that his rights had been invaded to resort to the Federal courts without having first exhausted his administrative remedies -- even the administrative remedy created by the bill.* * *"

Government officials are normally immune from personal liability for their official actions by reason of the doctrine that the "effective functioning of government" makes it essential that they "be free to exercise their duties unembarrassed by the fear of damage suits" against them as individuals (Barr v. Mateo, 360 U.S. 564 (1959)). The direct recourse to the courts which would result from section 4 would alter this doctrine and hamper the active and effective administration of the Government by opening its officials to the threat of personal lawsuits.

Conclusion

Our study of S. 782 has convinced us that the proposed legislation is unbalanced to such an extent that if legislation of this type is needed at all, the bill at hand requires extensive revision. We in the Civil Service Commission are as concerned as anyone, and more concerned than most, over the protection of employee rights (constitutional and otherwise). But we are equally concerned that the attempts to protect employee rights are not allowed to overshadow the fact that employees also have obligations to the Government and that the proper conduct of the public business is a paramount consideration when the rights and obligations of employees are under consideration. S. 782 is wholly devoted to employee rights, indeed to a very narrow group of employee rights. It overlooks completely the existence of employee obligations and the fact that exclusive attention to the protection of some rights, without consideration of related obligations and Governmental operational needs, may seriously disrupt the functions of government.

The Civil Service Commission submits that there is ample authority within the executive branch to correct any abuses of the type referred to in S. 782. The enactment of this bill will not end abuses of the type it covers, indeed the corrective-action provisions of the bill recognize that violations will continue. Our concern is that S. 782 is an unneeded and inappropriate means of coping with the complaints that prompted its introduction. Because of this, the Civil Service Commission is strongly opposed to the enactment of S. 782 as long as it contains provisions that establish an independent agency such as the Board on Employees' Rights and that provide direct access to the courts without any exhaustion of administrative remedies.

The Office of Management and Budget advises that there is no objection to the submission of this report and that enactment of S. 782 in its present form would not be consistent with the Administration's objectives.

By direction of the Commission:

Sincerely yours,

S/Robert E. Hampton

Chairman

APPENDIX

This appendix to the report of the Civil Service Commission on S. 782 supplements that report by supplying what we consider are necessary modifications of those sections of the bill which the Commission could endorse if they were a part of a bill that did not include the highly objectionable provisions of the type discussed in the report.

For convenience the appendix has been prepared in a section-by-section arrangement with references to S. 782 and amendments explained by page and line of the bill.

§ 1(a) would prohibit requesting an employee or applicant to disclose his race, religion, or national origin. There are times when there is a real need to request the disclosure of such information, i.e., to resolve a complaint of discrimination. We emphasize that this information would never be demanded or required--only requested on a voluntary basis. Because of this proper need, on page 2, line 18, we suggest that the period after "States" be changed to a colon and the following proviso be added, "Provided further, That nothing contained in this subsection shall be construed to prohibit a request for information concerning race, religion, or national origin of such employee or person when that matter is in issue in an allegation or complaint of discrimination." In addition, on line 10 of page 2, the word "statutory" should be deleted as the Commission has regulatory prohibitions against the employment of non-citizens which can be properly enforced only if citizenship inquiries are permitted.

§ 1(b) would prohibit intimating to an employee that notice will be taken of his attendance at a meeting which is not related to his official duties. The language used in this subsection has been sufficiently clarified by the legislative history so that the Commission is able to accept it without amendment. (S. Rept. No. 91-873, 91st Cong., 2d Sess. 38 (1970).)

§ 1(c) would prohibit requests that employees participate in activities that are not related to official duties. We have but one problem with this subsection which is that it could be interpreted so as to interfere with certain worthwhile activities such as the blood donor program. We suggest that on page 3, line 20, the period after "duties" be changed to a colon and the following proviso added, "Provided, however, That nothing contained in this subsection shall be construed to prohibit the use of appropriate publicity to inform employees of requests for assistance to public service programs or organizations."

§ 1(d) would prohibit requesting reports from employees on their outside activities unless the reports are related to official duties or when there is reason to believe a conflict-of-interest situation exists. We consider it essential for Federal managers to be able to make inquiries in areas relating to national security and employee safety. These inquiries may necessitate reports on activities not directly related to

an employee's official duties. So that these entirely reasonable types of inquiries may be made, the subsection should be amended by striking the language in the subsection after the comma on line 6 of page 4 and in lieu thereof inserting "or a report is necessary to assure the efficient and safe performance of the work of the department or agency, or for law enforcement purposes, or when the position of an employee is one that requires such a report in the interest of national security or in order to prevent outside activities or employment that would be in conflict with official duties."

§ 1(e) would prohibit the interrogation of an employee or applicant in regard to information concerning his personal relationship with a relative, his religious beliefs, or his sex attitudes. There is a proviso which would allow interrogation when a specific charge of sexual misconduct has been made. We do not construe the language regarding inquiries concerning a person's "personal relationship" with a relative as prohibiting inquiries needed to settle antinepotism cases under 5 U.S.C. 3110. The latter statute requires relationship inquiries (as distinguished from "personal" relationship inquiries) for proper enforcement. Accordingly, the Commission can accept subsection (e) without amendment.

§ 1(f) would prohibit requests to an employee or applicant to take a polygraph test relative to his personal relationship with relatives, his religious beliefs, or his sexual attitudes. The Civil Service Commission has prohibited the use of the polygraph for employment screening for positions in the competitive service except for agencies having a highly sensitive intelligence or counter-intelligence mission directly affecting national security and then only under the strict controls set forth in the Federal Personnel Manual, pages 736-D-1, 736-D-2 (copies attached). While subsection (f) would further narrow the use of the polygraph for a few agencies (the Civil Service Commission itself does not use it at all), we consider that the limited scope of subsection (f), and the exclusions of the intelligence-type agencies in sections 6 through 9 of S. 782 make subsection (f) not objectionable. In this regard we urge the Subcommittee to adopt the suggestions of the Department of State and the Department of Defense on S. 782 in order to further assure that the bill does not adversely affect the proper security interests of the Government.

§ 1(g) would prohibit requesting an employee to support by personal endeavor, or by the contribution of money or any thing of value, the nomination or election of a person or group to public office in the Federal or in a State or local government, or a request to an employee to attend a meeting to support a political party. We are of the opinion that this provision is out of place in S. 782 and rightfully belongs in legislation which relates to political activities generally, such as H.R. 2372, 91st Cong., 1st Sess. However, if this subsection is left in S. 782, aside from the duplicative nature of it when considered with

other legislation, such as subchapter III of chapter 73 of title 5, United States Code, we have no objection to the intended purpose of the provision or to the language used.

§ 1(h) expresses the present policy of the executive branch against the use of coercion in Government bond and charity drives. Accordingly, we have no objection to the subsection but suggest that for the sake of clarity the word "subsection" on line 12 of page 6 be changed to "section" so that neither subsection (c) or (d) is interpreted as negating the proviso in subsection (h).

§ 1(i) would prohibit requests that employees make financial disclosures except in limited circumstances (e.g., when the employee has final tax determination authority) which are further limited by § 1(k) to specific financial items "tending to indicate a conflict of interest". These two subsections, operating together, would destroy much of the present ethical conduct program within the executive branch. The provisions are unduly restricted in coverage in that they omit the inclusion of Presidential appointees and employees in several significant potential conflicts areas, such as grant administration, the regulation of private enterprise, and procurement. Furthermore, subsection (j) seems to be applicable only when a conflict of interest appears to exist, as distinguished from the present executive branch program which is aimed at preventing conflict situations from arising. These weaknesses can readily be corrected by inserting the words "Presidential appointee or any" on line 3 of page 7, after the word "any"; by inserting the words "a Government contract, grant, or the regulation of non-Federal enterprise, or with respect to" on line 5 of page 7, after the word "to"; and by changing the word "tending" on line 22 of page 7 to "which may tend".

§ 1(k) would not allow any questioning of an employee under investigation for misconduct which could lead to disciplinary action without the presence of counsel when requested. The present regulations of the Civil Service Commission and executive branch agencies assure employees of the right of counsel in disciplinary proceedings but not when ordinary day-to-day inquiries are necessary to allow normal supervisory operations. For example, under subsection (k) as presently drafted an employee thought to have been smoking in a restricted area could demand representation by counsel before answefing a supervisor's query as to whether or not he had been smoking. This unwarranted, and we assume unintended, restriction can be ended by changing the period after "involved" on line 12 of page 8 to a colon and adding the following proviso, "Provided, further, however, That the right of representation under this subsection shall not extend to informal discussions concerning job-related subjects such as work performance, attendance, and relations with other employees."

§ 1(l) would prohibit disciplinary and other retaliatory actions against an employee because of his refusal to comply with a request or submit to an action made unlawful by the bill. The Commission has no objection to this provision.

§ 2 makes applicable to the Civil Service Commission the various prohibitions set forth in section 1 which are applicable between the departments and agencies and the employees in, and applicants for positions in, those departments and agencies. The Commission has no objection to this section provided the other amendments suggested herein are made.

§ 3 makes applicable to commissioned officers of the armed forces, and to members of the armed forces acting under an officer's authority, the various prohibitions set forth in section 1. We do not object to this section.

§§ 4 and 5 are, as indicated in the body of our report, completely unacceptable to the Civil Service Commission. There are several alternatives to these sections that would not be objectionable. One would be to delete these sections and let the bill operate within the present executive branch grievance and appellate systems. In other words, the various actions made unlawful by section 1 of the bill would constitute valid bases for a grievance or an appeal under existing procedures. Another would be to create a statutory board within the Civil Service Commission to resolve all grievances, including those referred to in section 1 of S. 782. Also the Commission would not oppose a provision giving access to the courts if it first required the exhaustion of any available administrative remedy and if the defendant is the Government rather than an official of the Government. The Commission's staff will be glad to cooperate in preparing whatever type of legislation the Subcommittee considers appropriate in lieu of sections 4 and 5.

§§ 6, 7, 8, and 9 provide exceptions from all or portions of S. 782 for the Federal Bureau of Investigation, the Central Intelligence Agency, and the National Security Agency. The Commission has no objection to these sections. We do, however, urge that the Subcommittee give careful consideration to the additional exceptions needed in the interests of national security which are referred to in the reports on S. 782 submitted by the Department of State and the Department of Defense.

§ 10 is covered by the objections we have made to sections 4 and 5. Section 10 merely states that an agency may have a grievance procedure to enforce the bill, but that an employee need not use that procedure if he prefers to go directly to court or to the Board on Employees' Rights.

§ 11 is the usual separability provision to which we have no objection.

Appendix D. Use of the Polygraph in Personnel Investigations of Competitive Service Applicants and Appointees to Competitive Service Positions

D–1. AGENCIES WHICH MAY USE THE POLYGRAPH

An executive agency which has a highly sensitive intelligence or counterintelligence mission directly affecting the national security (e.g., a mission approaching the sensitivity of that of the Central Intelligence Agency) may use the polygraph for employment screening and personnel investigations of applicants for and appointees to competitive service positions only after complying with the procedures in D–2 below.

D–2. DETERMINING WHETHER AGENCY MISSION MEETS CRITERIA

The executive agency must submit to the Chairman of the Civil Service Commission a statement of the nature of its mission. The Chairman shall then determine whether the agency has an intelligence or counterintelligence mission directly affecting the national security.

D–3. REVIEW OF AGENCY REGULATIONS AND DIRECTIVES

a. The agency shall prepare regulations and directives governing use of the polygraph in employment screening and personnel investigations which must be reviewed by the Chairman of the Civil Service Commission. These shall contain as a minimum:

(1) Specific purposes for which the polygraph may be used, and details concerning the types of positions or organizational entities in which it will be used, and the officials authorized to approve these examinations.

(2) A directive that a person to be examined must be informed as far in advance as possible of the intent to use the polygraph and of—

(a) Other devices or aids to the interrogation which may be used simultaneously with the polygraph, such as voice recordings.

(b) His privilege against self-incrimination and his right to consult with legal counsel or to secure other professional assistance prior to the examination.

(c) The effect of the polygraph examination, or his refusal to take this examination, on his eligibility for employment. He shall be informed that refusal to consent to a polygraph examination will not be made a part of his personnel file.

(d) The characteristics and nature of the polygraph machine and examination, including an explanation of the physical operation of the machine, the procedures to be followed during the examination, and the disposition of information developed.

(e) The general areas of all questions to be asked during an examination.

(3) A directive that no polygraph examination will be given unless the person to be examined has voluntarily consented in writing to be examined after having been informed of the above, (a) through (e).

(4) A directive that questions to be asked during a polygraph examination must have specific relevance to the subject of the particular inquiry.

(5) Adequate standards for the selection and training of examiners, keeping in mind the Government's objective of insuring protection

for the subject of an examination and the accuracy of polygraph results.

(6) A provision for adequate monitoring of polygraph operations by a high-level official to prevent abuses or unwarranted invasions of privacy.

(7) A provision for adequate safeguarding of files, charts, and other relevant data developed through polygraph examinations to avoid unwarranted invasions of privacy.

D–4. RESTRICTION ON APPROVAL TO USE THE POLYGRAPH

Approval to use the polygraph will be granted only for 1-year periods. An agency given approval to use the polygraph for competitive service positions will be required to recertify annually that the conditions which led to the original certification still exist in the agency.